

Third Package Consultation Team

Department of Energy and Climate Change

Area 4C

3 Whitehall Place

London SW1A 2HD

Mutual Energy Limited

First Floor The Arena Building

85 Ormeau Road, Belfast BT7 1SH

Tel: +44 28 9043 7580 Fax: +44 28 9024 9673

Web: www.mutual-energy.com

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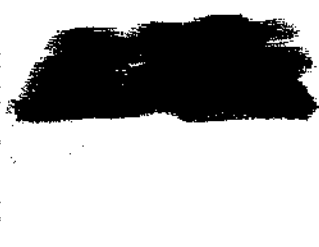
Dear Sir/Madam

Mutual Energy is a mutual company which manages energy assets in the long term interests of Northern Ireland's energy consumers. Having no shareholders, any financial surpluses are for the benefit of energy consumers. This combined with long term secure finance has allowed the company to manage major energy assets at a very low cost to consumers.

Mutual Energy is the ultimate holding company of Moyle Interconnector Limited and Premier Transmission Limited. Moyle Interconnector Limited owns and operates the Moyle Interconnector (Moyle) which links the electricity systems of Northern Ireland and Scotland, and Premier Transmission Limited owns and operates the Scotland to Northern Ireland natural gas transmission pipeline (SNIP). These strategically important assets provide vital energy links with Great Britain, and Mutual Energy manages them to the highest standards of safety, reliability and efficiency.

Mutual Energy welcomes the opportunity to respond to the DECC Consultation on the Implementation of the EU Third Internal Energy Package. The individual responses in this document represent views from Moyle Interconnector Limited and Premier Transmission Limited.

Yours Faithfully,



Moyle Interconnector Limited ("Moyle") Response to DECC Consultation on the Implementation of the EU Third Internal Energy Package (the "Consultation")

1. Introduction

- 1.1 Moyle is grateful for the opportunity to respond to this important Consultation. The nature of Moyle's 100% bond financing arrangements and mutualised structure means that any changes to the regulatory regime on which its financing arrangements are based are of critical importance to it and the electricity consumers of Northern Ireland who ultimately underwrite Moyle's financing. When Moyle was originally financed in 2003 it was not licensed in Great Britain on the basis that it was appropriately regulated in Northern Ireland. It is now required to hold an Interconnector Licence in Great Britain, but key conditions are not in effect on the basis that they are regulated in Northern Ireland. The potential impact of the implementation of the Third Package is of critical significance to Moyle and it is critical that the pragmatic approach to the regulation of Moyle adopted to date by the regulatory authorities in Great Britain does not change.
- 1.2 Moyle has set out below its high level response to the issues raised which are of particular importance to it.

2. Application of the Consultation Paper – Avoidance of Double Regulation

- 2.1 Moyle holds a Licence to Participate in Transmission in Northern Ireland (the "NI Licence") and is regulated as owner of the Moyle Interconnector by the Northern Ireland Authority for Utility Regulation ("NIAUR"). Although Moyle also holds an Interconnector Licence in Great Britain, a number of the conditions of this licence are not in effect. This is in recognition of the fact that as Moyle Interconnector links Northern Ireland and Great Britain, the United Kingdom is able to discharge its obligations as a Member State under European Law (including under the Third Package) by regulation in either Northern Ireland or Great Britain. Consequently overlapping licence conditions are 'switched off' in order to avoid inappropriate and unnecessary double regulation of the Moyle Interconnector.
- 2.2 It is Moyle's firm view that this principle (that it should not be subjected to inefficient double regulation) should continue to apply in the context of the implementation of the Third Package. As such, only one regulator in the United Kingdom should have responsibility for implementation of the Third Package in respect of Moyle. We would invite DECC to agree with the Northern Ireland Department of Enterprise Trade and Investment ("DETI") that DETI and NIAUR are the most appropriate entities to take responsibility in this regard.
- 2.3 Moyle notes that DETI will be consulting separately on implementation measures as they apply in Northern Ireland, and we look forward to participating fully in this process, including in relation to the detailed requirements of the Third Package.
- 2.4 Each of our comments below should be read in this context.



3. Moyle as a Transmission System Operator

- 3.1 As DECC has outlined in the Consultation Paper, Article 9 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (the "Directive") provides that from March 2012 undertakings that own transmission systems should also act as operator of the Transmission System. Interconnectors fall within the scope of 'transmission systems' for the purposes of the Directive.
- 3.2 As a consequence of this DECC has noted at paragraph 2.31 that interconnectors will now need to meet the requirements placed on TSOs by the Third Package including those in relation to transmission unbundling. DECC also proposes to introduce the relevant tasks of the TSOs and confidentiality requirements. DECC further notes that licence changes will be required to make licences comply with the Electricity Regulations.
- 3.3 We consider that such detailed implementation measures should, in the context of the Moyle Interconnector, be considered a matter for DETI and will be dealt with as part of the Northern Ireland consultation on Directive transposition referred to in the Consultation Paper.
- 3.4 That being said, we note in this regard that DECC cites at paragraph 2.4 a statement from the European Commission that the purpose of the unbundling regime is to:
- "remove the incentive for vertically integrated undertakings to discriminate against competitors as regards access to the network, as regards access to commercially relevant information and as regards investment in the network".
- DECC states that implementation in GB will be based on these principles.¹ DECC further recognises at paragraph 2.8 that 'it is important that these unbundling requirements are introduced in a way that addresses the 'conflict of interest' concerns they were designed to address', and that 'there will need to be a consideration of what is proportional, both in terms of the requirement and enforcement'.
- 3.5 Moyle fully supports these statements, and considers that a purposive and proportionate approach should be applied not only in the case of unbundling, but also in the implementation of the Directive more generally.
- 3.6 In relation to unbundling and the 'conflict of interest' concerns the Directive intended to address, we note that Moyle's current structure is consistent with Article 9 of the Directive in that Moyle does not carry out power generation, distribution or supply activities (and may not under Condition 14 of its Northern Ireland licence). Neither is it involved in the production or supply of gas.

¹ Paragraph 2.4



3.7 In relation to implementation of the requirement for Moyle to act as a Transmission System Operator ("TSO"), it is important that a purposive and proportionate approach also is adopted. Moyle notes that under the current regulatory regime, the transmission licences granted to both Moyle and SONI under Article 10(1)(b) of the Electricity (Northern Ireland) Order 1992 contain provisions requiring the Moyle Interconnector to be operated by SONI pursuant to the Moyle Interconnector Operation and Agency Agreement.² Moyle is required pursuant to its licence to appoint / nominate SONI to act as Interconnector Administrator and the Interconnector Error Administrator.³ We do not consider that the preservation of these existing arrangements would prejudice the licensing and treatment of Moyle as a TSO.

3.8 In relation to "acting" as a "transmission system operator", it is noted that the Directive provides that:

"transmission system operator" means a natural or legal person *responsible* for operating, *ensuring* the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for *ensuring* the long-term ability of the system to meet reasonable demands for the transmission of electricity" (*our emphasis*)

4. Tasks of Transmission System Operators

4.1 Article 12 of the Directive sets out the tasks of transmission system operators. DECC has suggested that changes will be required to the Electricity Regulation to ensure that these tasks are also assigned to Interconnector operators, via their respective licences as required. Without prejudice to our view that this is a matter for DETI in relation to Moyle, we would note at the outset that the majority of these requirements are wholly inappropriate for Moyle and it is critical that to the extent that such provisions are incorporated in the Electricity Regulation or in the Moyle's Interconnector Licence that Moyle's position as the owner of a single asset is recognised and expressly dealt with.

4.2 We note for example that some of the obligations imposed on the National Grid as TSO would be wholly inappropriate in the context of Moyle. The requirement to have in place a Grid Code (under Condition C14), obligations in relation to the procurement and use of balancing services (under Condition C16), or to operate and maintain the system in accordance with the National Electricity System Security standard would require significant investment on the part of Moyle with no benefit to electricity customers in the UK given it is a single asset business.

² This is defined in Moyle's licence as the agreement of that name between the Licensee and SONI, ... which, amongst other things, makes provision for the Moyle Interconnector to be operated by SONI.

³ As such expressions are defined in the Great Britain Balancing and Settlement Code and the Single Electricity Market Trading and Settlement Code, as appropriate (see Condition 19 of Moyle's licence and Condition 37 of SONI's licence).



- 4.3 Article 12 of the Directive also sets out a series of tasks for which the transmission system operator "shall be responsible".⁴ While we fully accept that ultimate responsibility for the tasks rests with the transmission system operator. Moyle would submit that so long as that responsibility and control is maintained, there is no prohibition in the Directive on the transmission system operator outsourcing to third parties certain services to comply with the tasks contained in Article 12 and thereby discharging its obligations.⁵
- 4.4 We accept that it would appear contrary to the spirit of the Directive to outsource those tasks which go to the heart of the transmission system operator's ability to secure the core aims of effective unbundling; namely fair competition, sufficient investment, access for new market entrants and the integration of electricity markets. These principles remain at the core of the regulatory framework applied to Moyle in the context of the second directive. That being said, there should be no difficulty with SONI continuing to provide services of the nature it currently provides to Moyle under the Moyle Interconnector Operation and Agency Agreement. It should also be noted that SONI is not part of a "vertically integrated undertaking" within the meaning of the Directive. Accordingly, its involvement in operation of the interconnector does not risk there being any suggestion of a party involved in operation of the interconnector also being involved in generation or supply.
- 4.5 We note that at paragraph 4.36 DECC sets out specific additional requirements which might be applied to Moyle. These relate to network security and quality of service and access to cross-border infrastructures including the procedures for allocation of capacity and congestion management and monitoring investment plans of the transmission system operators. While accepting that each of these requirements (to the extent already provided for) will need to be imposed in the context of the Third Package, we consider that this is more appropriately dealt with in the context of the existing Northern Ireland regulatory framework.

5. Role of the National Regulatory Authority

- 5.1 Paragraphs 4.40 – 4.43 of the Consultation Paper detail DECC's intention to amend the current collective licence modification process in response to Article 37(1)(d) of the Directive which places an additional duty on the regulatory authority to comply with, and implement any relevant legally binding decisions of the Agency and of the Commission. Article 37(17) requires Member States to ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any Government.

⁴ These tasks are considered further below and set out in full in schedule 1.

⁵ On the contrary, Article 9(5) specifically envisages a particular situation in which the owner tasks a separate entity with operator functions (i.e. where owners in two different states create a joint venture which acts as operator. In such cases the operator joint venture must have been approved pursuant to the Directive as an ISO or ITO).



- 5.2 The view expressed in the Consultation Paper is that the current collective licence modification process does not provide an effective and expeditious way for Ofgem to exercise its functions in the way envisaged by the Third Package. It is therefore proposed that in future Ofgem would be permitted to reach its decisions (in relation to all matters and not merely the Third Package licence modifications) as to licence modifications subject to appeal to an appropriate body. The decisions would continue to be reached following consultation and subject to the principles of better regulation.
- 5.3 This constitutes a fundamental shift of onus in relation to modification of licence conditions and removes safeguards which previously provided a means by which affected licensees could object to the proposed measures and ensure, where necessary, that these were subjected to a thorough review by the Competition Commission prior to their implementation.
- 5.4 DECC's proposal constitutes a significant shift in the balance of regulatory risk in relation to interconnectors and notes that such an amendment may have unintended repercussions for not only the Moyle Interconnector but for other project financed market participants given that they may inadvertently put such companies in breach of covenants in their financing documents without appropriate opportunity to address the issues in advance. While a right of appeal may ultimately address a concern of a licence holder, it will not address the concern that the licence holder may have previously been put in breach of covenants in its financing documents. In light of its funding arrangements, Moyle is particularly sensitive to such fundamental changes to the regulatory regime within which it operates.
- 5.5 We consider that this proposal goes far beyond the requirements of Article 37(1) (d) (in relation to implementing legally binding decisions of the Agency or the Commission), indeed so much so that we query whether a change in these terms might properly be implemented by means of regulations under section 2(2) of the European Communities Act 1972. While we accept the requirement to place Ofgem in a position to discharge the obligation imposed by Article 37(1)(d), we suggest that the amendment to the modification process be far more narrowly drawn and provide for immediate implementation of measures only where a direction of the Agency or the Commission requires. In this context licensees may at least rely on the fact that such measures will first have undergone consultation at a European level, prior to their ultimate implementation in Great Britain.



Premier Transmission Limited ("PTL") Response to DECC Consultation on the Implementation of the EU Third Internal Energy Market Package (the "Consultation")

1. Introduction

- 1.1 PTL is grateful for the opportunity to respond to this Consultation. PTL owns and operates the Scotland-Northern Ireland Pipeline ("SNIP"). The nature of PTL's mutualised and 100% bond financed funding structure is such that any proposed amendments to the regulatory regime underpinning the operation of the SNIP are of critical importance to PTL. It is vital that any amendments brought about in response to the Third Package do not have unintended consequences for PTL's financing structure. PTL cannot be put at risk of not meeting its financial obligations.
- 1.2 In this regard we note the importance of regulatory certainty in underpinning the mutualised model and the need to avoid unnecessary 'double regulation' of the Interconnector.
- 1.3 PTL has set out below its high level response to the issues raised in the Consultation Paper which are of particular importance to it.

2. Application of the Consultation Paper – Avoidance of Double Regulation

- 2.1 PTL holds a Licence for the Conveyance of Gas in Northern Ireland and is designated¹ (and regulated) as a transmission system operator ("TSO") by the Northern Ireland Authority for Utility Regulation ("NIAUR"). PTL is currently exempted from the requirement to hold a Transporter Licence in Great Britain by virtue of S.I. 2427 of 1997.² Although PTL holds a Gas Interconnector Licence in Great Britain, a number of conditions of this licence are not in effect. This is in recognition of the fact that as SNIP links Northern Ireland and Great Britain, the United Kingdom is able to discharge its obligations as a Member State under European Law (including under the Third Package) by regulation in either Northern Ireland or Great Britain. Consequently overlapping licence conditions are 'switched off' in order to avoid inappropriate and unnecessary double regulation of SNIP.
- 2.2 It is PTL's firm view that this principle (that it should not be subjected to inefficient double regulation) should continue to apply in the context of the implementation of the Third Package. As such, only one regulator in the United Kingdom should have responsibility for implementation of the Third Package in respect of PTL. We would invite DECC to agree with the Northern Ireland Department of Enterprise Trade and

¹ PTL is designated as transmission system operator for its network (for the purposes of Article 7 of Directive 2003/55/EC) by Condition 2.14 of its NI Licence.

² The Gas Act 1986 (Exemption) Order 1997. We note a separate consultation is currently underway concerning the extension of this exemption. While PTL intends to respond separately to this consultation, we note at a high level our strong view that this exemption should be extended, not least in order to avoid inefficient double regulation of the Interconnector and associated transmission pipelines.



Investment ("DETI") that DETI and NIAUR are the most appropriate entities to take responsibility in this regard.

- 2.3 PTL notes that DETI will be consulting separately on implementation measures as they apply in Northern Ireland, and we look forward to participating fully in this process, including in relation to the detailed requirements of the Third Package.
- 2.4 Each of our comments below should be read in this context.

3. Tasks of Transmission System Operators

- 3.1 As DECC has outlined in the Consultation Paper, Article 9 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (the "Directive") provides that from March 2012 undertakings that own transmission systems should also act as operator of the Transmission System. Interconnectors fall within the scope of 'transmission systems' for the purposes of the Directive.
- 3.2 We have already noted that PTL is regulated as a TSO in Northern Ireland. However in the context of the Third Package and this Consultation, DECC has noted at paragraph 2.31 that interconnectors will now need to meet the requirements placed on TSOs by the Third Package including those in relation to transmission unbundling. This, we understand, will be achieved through amendments to the Gas Regulations and to the conditions of Interconnector licences. DECC proposes to introduce the relevant tasks of the TSOs and confidentiality requirements to Interconnector licences. DECC further proposes at paragraphs 3.60 – 3.61 to make changes to gas Interconnector licences to introduce a new requirement to secure an open market through secure, reliable and efficient transmission and to build sufficient cross-border capacity.
- 3.3 We consider that such detailed implementation measures should, in the context of the SNIP, be considered a matter for DETI and will be dealt with as part of the Northern Ireland consultation on Directive transposition referred to in the Consultation Paper.
- 3.4 That being said, we note in this regard that DECC cites at paragraph 2.4 a statement from the European Commission that the purpose of the unbundling regime is to:

"remove the incentive for vertically integrated undertakings to discriminate against competitors as regards access to the network, as regards access to commercially relevant information and as regards investment in the network".



DECC states that implementation in GB will be based on these principles.³ DECC further recognises at paragraph 2.8 that 'it is important that these unbundling

requirements are introduced in a way that addresses the 'conflict of interest' concerns they were designed to address', and that 'there will need to be a consideration of what is proportional, both in terms of the requirement and enforcement'.

3.5 PTL fully supports these statements, and considers that a purposive and proportionate approach should be applied not only in the case of unbundling, but also in the implementation of the Directive more generally.

3.6 In relation to unbundling and the 'conflict of interest' concerns the Directive intended to address, we note that PTL's current structure is consistent with Article 9 of the Directive in that PTL is not involved in the production or supply of gas. Neither is PTL involved in the functions of generation and supply within the meaning of Directive 2009/72/EC.⁴

3.7 In relation to obligations to be imposed on PTL as a TSO, it is clearly important that a proportionate and 'common sense' approach is applied. Article 13 of the Directive sets out a series of tasks for which the transmission system operator "shall be responsible". DECC has suggested that changes will be required to the Gas Regulation to ensure that these tasks are also assigned to Interconnector operators, via their respective licences as required. Without prejudice to our view that this is a matter for DETI in relation to SNIP, we would note at the outset that a number of these requirements are wholly inappropriate for SNIP and it is critical that to the extent that such provisions are incorporated in the Gas Regulation or in the PTL's Interconnector Licence that PTL's position as an Interconnector owner is recognised and expressly dealt with. We note for example that the requirement to build sufficient cross-border capacity to integrate European transmission infrastructure (Article 13(2)) would be wholly inappropriate in the context of PTL.

4. Role of the National Regulatory Authority⁵

4.1 Paragraphs 4.40 – 4.43 of the Consultation Paper detail DECC's intention to amend the current collective licence modification process. In response to Article 37(1)(d) of the Directive which places an additional duty on the regulatory authority to comply with, and implement any relevant legally binding decisions of the Agency and of the Commission. Article 37(17) requires Member States to ensure that suitable

³ Paragraph 2.4

⁴ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC

mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any Government.

- 4.2 The view expressed in the Consultation Paper is that the current collective licence modification process does not provide an effective and expeditious way for Ofgem to exercise its functions in the way envisaged by the Third Package. It is therefore proposed that in future Ofgem would be permitted to reach its decisions (in relation to all matters and not merely the Third Package licence modifications) as to licence modifications subject to appeal to an appropriate body. The decisions would continue to be reached following consultation and subject to the principles of better regulation.
- 4.3 This constitutes a fundamental shift of onus in relation to modification of licence conditions and removes safeguards which previously provided a means by which affected licensees could object to the proposed measures and ensure, where necessary, that these were subjected to a thorough review by the Competition Commission prior to their implementation.
- 4.4 DECC's proposal constitutes a significant shift in the balance of regulatory risk in relation to interconnectors and notes that such an amendment may have unintended repercussions for not only PTL but for other project financed market participants given that they may inadvertently put such companies in breach of covenants in their financing documents without appropriate opportunity to address the issues in advance. While a right of appeal may ultimately address a concern of a licence holder, it will not address the concern that the licence holder may have previously been put in breach of covenants in its financing documents. In light of its funding arrangements, PTL is particularly sensitive to such fundamental changes to the regulatory regime within which it operates.
- 4.5 We consider that this proposal goes far beyond the requirements of Article 37(1)(d) (in relation to implementing legally binding decisions of the Agency or the Commission), indeed so much so that we query whether a change in these terms might properly be implemented by means of regulations under section 2(2) of the European Communities Act 1972. While we accept the requirement to place Ofgem in a position to discharge the obligation imposed by Article 37(1)(d), we suggest that the amendment to the modification process be far more narrowly drawn and provide for immediate implementation of measures only where a direction of the Agency or the Commission requires. In this context licensees may at least rely on the fact that such measures will first have undergone consultation at a European level, prior to their ultimate implementation in Great Britain.

